UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte YPKE VINCENTIUS JOHANNES MARIA VAN OOOSTERHOUT and JANNY ELISABETH VAN EMST

Appeal No. 2005-2742
Application No. 09/668,555

ON BRIEF

Before ELLIS, ADAMS, and GREEN, Administrative Patent Judges.

ADAMS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-8, 10-13, 15 and 18-26, which are all the claims pending in the application.

Claim 1 is illustrative of the subject matter on appeal and is reproduced below:

1. A pharmaceutical composition for eliminating or reducing the number of unwanted CD3 and/or CD7 positive cells, said pharmaceutical composition consisting essentially of: first molecules directed against CD3, and second molecules, distinct from said first molecules, said second molecules directed against CD7, wherein at least one of said first and said second molecules include a toxic moiety.

The references relied upon by the examiner are:

Thorpe et al. (Thorpe)	6,261,535	Jul. 17, 2001
Scannon	WO 89/06967	Aug. 10, 1989

GROUNDS OF REJECTION

Claims 1-5, 7, 8, 10-13, 15, 18, 19, and 21-26 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Scannon.

Claims 1-8, 10-13, 15, and 18-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Scannon in view of Thorpe.

We affirm.

CLAIM GROUPING

According to appellants (Brief, page 3), the claims stand or fall together.[1] Since all claims stand or fall together, we limit our discussion to representative independent claim 1. For the anticipation rejection claims 2-5, 7, 8, 10-13, 15, 18, 19 and 21-26 stand or fall together with claim 1. For the obviousness rejection claims 2-8, 10-13, 15 and 18-26 will stand or fall together with claim 1. In re Young, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991).

[1] We note appellants' reference to Groups I – IV. Brief, pages 4 and 9. However, according to appellants' Brief (page 3), the claims stand or fall together. In this regard, we note that the Brief contains no discussion of which claims relate to any of Groups I – IV. Further we find no separate argument for any claim on appeal. Accordingly, the claims will stand or fall together. At best, the Brief simply restates the limitations of the independent claims on appeal. Brief, pages 4-5. We note, however, that merely pointing out differences in what the claims cover is not an argument as to why the claims are separately patentable. 37 C.F.R. § 1.193 (c)(7) (2003).

DISCUSSION

Anticipation:

Appellants' claim is drawn to a pharmaceutical composition that consists essentially of first molecules directed against CD3, and second molecules directed against CD7, wherein at least one of said first and said second molecules include a toxic moiety.

The examiner relies on Scannon to teach a composition within the scope of appellants' claimed invention. According to the examiner (Answer, page 3), Scannon teaches the use of a pharmaceutical composition containing the immunotoxins anti-CD3-ricin A and anti-CD7-ricin A to treat GVHD. To support this assertion the examiner directs attention to page 4, first paragraph; page 6, first paragraph; page 12; and page 13 of Scannon. Id.

Upon consideration of the reference, we find that while Scannon teach (e.g. page 9), alternative immunotoxin compositions, Scannon specifically teach "in one embodiment of the present invention, an immunosuppressive immunotoxin composition will comprise at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters." In our opinion, one of skill in the art reading this teaching in Scannon would immediately envisage a small class of seven compositions with common properties. In re Petering, 301 F.2d 676, 681, 133 USPQ 275, 280 (CCPA 1962). Specifically, compositions that will comprise a molecule reactive with: (1) CD3; (2) CD5; (3) CD7; (4) CD3 and CD5; (5) CD3 and CD7; (6) CD5 and CD7; or (7) CD3, CD5 and CD7. Stated differently, we understand Scannon's use of

the phrase "at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters," to represent a short-hand way of expressing the seven compositions set forth above. In addition, we note that while the title of the Scannon reference is "immunosuppression with anti-pan T cell immunotoxin compositions," the only anti-pan T cell immunoglobulin reactive agents taught by Scannon, are CD3, CD5 and CD7. See e.g., Scannon, page 9. Further, as set forth on page 4 of Scannon, "[t]he cytotoxic agent component of the immunotoxin is preferably a ribosomal inhibiting protein, such as ricin or ricin A-chain." Accordingly, we agree with the examiner's finding that Scannon teach a pharmaceutical composition containing the immunotoxins anti-CD3-ricin A and anti-CD7-ricin A.

For their part, appellants assert (Brief, page 6), Scannon teaches the use of molecules which target CD9 and CD11 in addition to CD3 and CD7. While it is true that Scannon teach (e.g., page 4), an alternative composition that may comprise "a collection of immunoglobulins reactive with a plurality of T-cell markers, such as those associated with the antigen clusters CD2, CD3, CD4, CD5, CD6, CD7, CD9, CD11 and CD45R," Scannon also teach, as discussed above, a composition containing the immunotoxins anti-CD3-ricin A and anti-CD7-ricin A. In our opinion, such a composition is within the scope of appellants' claim 1, which is drawn to a pharmaceutical composition that consists essentially of first molecules directed against CD3, and second molecules directed against CD7, wherein at least one of said first and said second molecules include a toxic moiety. Accordingly, we are not persuaded by appellants' argument.

While appellants recognize (Brief, page 8), "Scannon reduces to practice ... the creation and testing of an immunotoxin targeting the CD5 molecule," appellants assert (Brief, page 7), "Scannon does not provide an enabling disclosure such that one skilled in the art at the time the invention was made could employ molecules directed at either CD3 or CD7 to eliminate or reduce the number of CD3 or CD7 positive cells without undue experimentation." However, according to Scannon (page 9), "[a]n immunosuppressive immunotoxin composition will typically comprise immunoglobulins (complexed with toxins) that are capable of binding to and removing one or more T-cell subpopulations...." As discussed above, Scannon teach (page 9), a composition comprising at least one pan T-cell immunoglobulin reactive agent, e.g., reactive with the CD3, CD5 or CD7 antigen clusters. One such immunotoxin composition will contain anti-CD3-ricin A and anti-CD7-ricin A; another will contain anti-CD5-ricin A. As we understand it, there is no reason to expect one such immunotoxin composition (e.g., a composition containing anti-CD5-ricin A), to bind and remove T-cell populations, and not another (e.g., a composition containing anti-CD3-ricin A and anti-CD7-ricin A). As appellants' point out (Brief, page 7), Scannon exemplifies an immunotoxin composition that contains anti-CD5-ricin A. See Scannon, pages 14-20. Accordingly, we disagree with appellants' assertion that simply because Scannon did not exemplify every embodiment of their disclosure, Scannon's specification does not provide an enabling disclosure of a composition containing anti-CD3-ricin A and anti-CD7-ricin A. We find no evidence on this record to support this assertion. We also find no evidence to

support appellants' assertion (Brief, page 8) that at the time the invention was made it was unpredictable whether CD3 or CD7 were adequate targets for the destruction of T-cells. In this regard, we remind appellants that attorney argument cannot take the place of evidence lacking in the record. Meitzner v. Mindick, 549 F.2d 775, 782, 193 USPQ 17, 22 (CCPA 1977).

On reflection, we find no error in the examiner's prima facie case of anticipation. Accordingly, we affirm the rejection of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Scannon. As set forth above, claims 2-5, 7, 8, 10-13, 15, 18, 19, 21-26 fall together with claim 1.

Obviousness:

Claims 1-8, 10-13, 15, and 18-26 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Scannon in view of Thorpe. The examiner relies on Scannon as discussed above. The examiner relies on Thorpe to teach deglycosylated ricin A (a limitation in e.g., appellants' dependent claim 6), which is not taught by Scannon. Since deglycosylated ricin A is not a limitation of claim 1 on appeal we do not address the Thorpe reference.

As discussed above, Scannon anticipates the composition set forth in appellants' claim 1. Accordingly, for the foregoing reasons we affirm the rejection of claim 1 under 35 U.S.C. § 103 as being unpatentable over Scannon in view of Thorpe. As set forth in Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 716, 223 USPQ 1264, 1271 (Fed. Cir. 1984), "a disclosure that anticipates under § 102 also renders the claim invalid under § 103, for

'anticipation is the epitome of obviousness,' In re Fracalossi, 681 F.2d 792, 215 USPQ 569 (CCPA 1982)." As discussed above claims -8, 10-13, 15, and 18-26 fall together with claim 1.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

Joan Ellis)
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